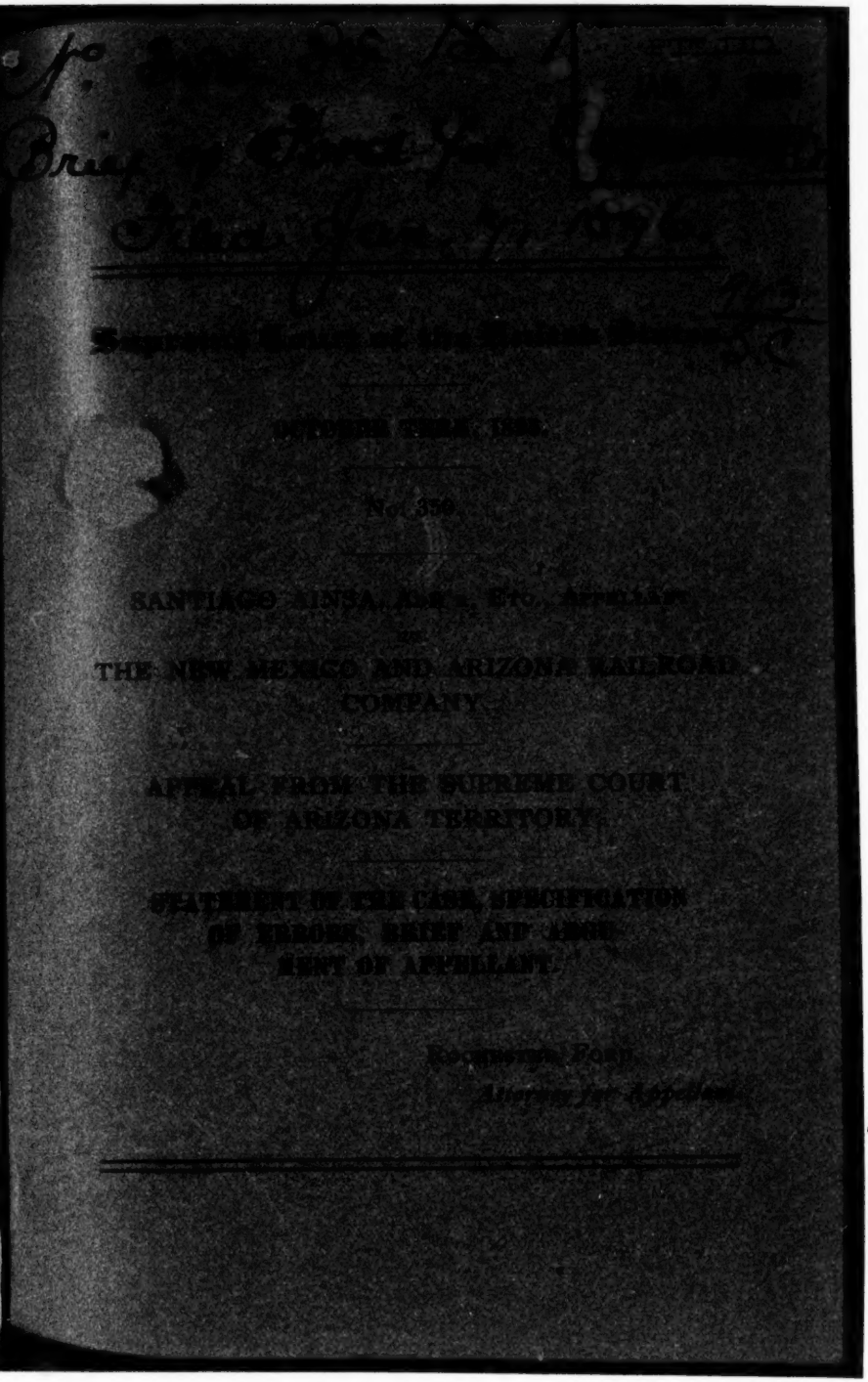

OCTOBER TERM, 1898.

No. 350.

SANTIAGO ARNA, Adm'r, Etc., APPELLANT,

vs.

THE NEW MEXICO AND ARIZONA RAILROAD COMPANY.

APPEAL FROM THE SUPREME COURT OF ARIZONA TERRITORY.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT OF APPELLANT.

Edmund Ford,

Attorney for Appellant.

Supreme Court of the United States.

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STATEMENT OF THE CASE.

This case was instituted by the filing, on June 1, 1892, in the district court of the first judicial district of the Territory of Arizona, in and for the county of Pima, of the complaint set out in the record, in which plaintiff alleged that defendant was a railroad corporation duly organized and existing; that plaintiff as administrator was the owner in fee of that piece of land known as the rancho San José

de Sonoita, granted by the Mexican authorities on May 15, 1825, to one Leon Herreros, which rancho or grant was fully described in the complaint. Plaintiff further alleged that defendant claimed some estate or interest in said land adverse to plaintiff, but that such claim was without right, and prayed for a decree adjudging plaintiff's title to be good and valid. The complaint is the same as the one passed on by this Court in Ely *v.* New Mexico and Arizona Railroad Co., 129 U. S. 291.

Defendant answered claiming a right of way through said premises by virtue of conveyances from certain owners or occupants of said lands.

A jury was waived and the case was submitted to the court on an agreed statement of facts, in which the parties stipulated as follows:

1. That the following Spanish or Mexican grant was made, executed and delivered to the grantee named therein at the time and place and by the persons and officials when, where and by whom it purports to have been signed, made, executed and delivered, and that the plaintiff herein is the vendee and assignee of and has acquired all the right, title and interest of the original grantee thereof, and that the following is a correct translation thereof (which translation appears in full in the record).

2. That the claimant under said grant filed on December 29, 1879, in the office of the United States Surveyor General for the Territory of Arizona, under the provisions of the acts of Congress of July 22, 1854, and July 15, 1870, a petition for the confirmation of said grant, accompanying which was the testimonio of same (the translation of which is hereinbefore set out), but that said petition or grant was never acted on by Congress, and that at the time of the institution of this suit no proceedings for the confirmation of said grant were pending

before any Surveyor General of the United States, or before Congress, or before the Court of Private Land Claims created under the provisions of the act of Congress of March 3, 1891.

3. That prior to the commencement of this action certain persons had entered upon land within the limits of the said grant under which plaintiff claims, as preëmption or homestead settlers, claiming said lands to be public lands of the United States; that thereafter, and before the commencement of this action, by condemnation proceedings against sundry mesne conveyances from said persons the defendant acquired and now claims a right of way through said several tracts of land so settled upon, which right of way is within the limits of the said grant.

On this agreed statement the territorial district court held that it had no jurisdiction, and dismissed the complaint and action for want of jurisdiction. An appeal was taken to the Supreme Court of Arizona, which court found the facts to be the same as found by the lower court and adopted the same as its findings, and affirmed the judgment, 36 Pac. Rep., 213. Plaintiff appealed to this court.

SPECIFICATION OF ERRORS.

I.

The court erred in dismissing the complaint in this action and in rendering judgment for defendant instead of for plaintiff.

II.

The court erred in rendering its judgment dismissing the complaint, because it appears from the agreed statement of facts herein that defendant had no estate, title or interest in the lands described in the complaint, and that plaintiff is the owner in fee thereof.

POINTS AND AUTHORITIES.

I.

The Gadsden treaty, under which the land in controversy was acquired from Mexico, adopts as article 5 all the provisions of the ninth article of the the treaty of Guadalupe Hidalgo, which ninth article is the same as the third article of the treaty of Paris, April 30, 1803, and is as follows:

"The Mexicans who, in the territories aforesaid, shall not preserve the character of citizens of the Mexican Republic, conformably with what is stipulated in the preceding article, shall be incorporated into the Union of the United States, and be admitted at the proper time (to be judged of by the Congress of the United States) to the enjoyment of all the rights of citizens of the United States, according to the principles of the Constitution; and in the

mean time shall be maintained and protected in the free enjoyment of their liberty and property, and secured in the free exercise of their religion without restriction."

II.

Under this provision of the treaty complete or perfect titles needed no legislative confirmation, and the owners of such titles may assert them in the ordinary forms of law upon the documents under which they claim.

U. S. *v.* Pillerin, 13 How. 9.
U. S. *v.* McCullagh et al., 13 How. 215.
U. S. *v.* Roselius et al., 15 How. 36.
Fremont *v.* U. S., 17 How. 541, 553.
Maguire *v.* Tyler, 8 Wall. 650.
Trenier *v.* Stewart, 101 U. S. 797.
U. S. *v.* D'Auterieve et al., 15 How. 14.
Dent *v.* Emmeger, 14 Wall. 306.
Strother *v.* Lucas, 12 Pet. 410.
U. S. *v.* Arredondo, 6 Pet 691.
Murdock *v.* Gurley, 5 R (Louisiana) 457.
Prevost *v.* Greenaux, 19 H (Louisiana) 1.
Jewell *v.* Porche, 2 A (Louisiana) 148.
Hancock *v.* McKinney, 7 Tex. 384.

III.

The grant under which plaintiff claims title is such a complete and perfect title, and vested the fee in the grantee.

See language of title-paper.
U. S. *v.* Turner, 11 How. 663.

U. S. *v.* Watkins, 97 U. S. 219.

Carpentier *v.* Montgomery, 13 Wall. 480, 493, 494.

U. S. *v.* Knight's adm'r, 1 Black, 227.

Phelan *v.* Poyorena, 13 Pac. Rep. 681.

U. S. *v.* Pico, 5 Wall. 538.

Malarin *v.* U. S., 1 Wall. 282.

U. S. *v.* Pacheco, 22 How. 225.

Cameron *v.* U. S., 148 U. S., 301.

IV.

Under the eighth section of the act of March 3, 1891, establishing the Court of Private Land Claims, holders of complete or perfect titles are given the privilege of presenting their titles to that court or refusing to do so at their option, and no penalty is provided or statute of limitation established as to perfect titles not so presented.

See eighth section of the act.

ARGUMENT.

The substantial question in this case is, Can one who is conceded to be the owner of a piece of land granted by Mexico under the Gadsden purchase by what is claimed to be a complete and perfect title in fee, bring suit in the court of ordinary jurisdiction to quiet his title before his grant is confirmed and while no proceedings for its confirmation are pending?

The lower court held that he could not, but the very many cases decided by this Court under the treaty of Paris, the Florida purchase, the treaty of Guadalupe Hidalgo, the Gadsden purchase and the Alaska purchase

announce principles which, it is believed, show in the clearest manner that such holding is erroneous.

The position which it will be attempted to maintain in this argument is based on the following propositions:

1. That the decisions of this court on the third article of the treaty of Paris are directly applicable to the ninth article of the treaty of Guadalupe Hidalgo and the fifth article of the Gadsden treaty, because these provisions of the treaties are identical.

2. That this suit could have been maintained under the treaty of Paris, and can therefore be maintained now, because

3. Although Congress may by legislation violate treaty obligations and the courts cannot review such action, it has never by any act attempted to disregard the above-cited treaty provisions, and the standing of plaintiff in this action is the same as that of the owner of land by a complete and perfect title under the treaty of Paris.

1. The first of these points is self-evident. The Gadsden treaty contains the above quoted third article of the treaty of Paris as fully as though it were set out therein in so many words.

2. Could this suit have been maintained under the Paris treaty as that treaty has been construed by this Court? It seems that there can be no doubt as to this. The cases on this point in this Court are clear, numerous and consistent.

In carrying out the Louisiana treaty Congress passed the acts of 1824 and 1844, which gave the District Courts of the United States an equitable jurisdiction to confirm inchoate and incomplete titles, but, as repeatedly held by this Court, the District Courts had no jurisdiction conferred upon them over perfect titles. The cases of U. S. *v.* Pillerin and U. S. *v.* McCullagh, *supra*, give a history of this legislation.

The situation under the Louisiana treaty was, therefore, that the District Courts of the United States were given jurisdiction over inchoate or incomplete titles, but no legislation of any kind was passed regarding perfect titles.

The question which is decisive of this case is, In the absence of any legislation as to perfect titles, how did they stand under the Paris treaty and by virtue of it alone? This question is answered in the series of cases cited under the first point of this brief. Thus, in U. S. *v.* Pillerin, *supra*, this Court said:

"Such a title (i. e., a complete or perfect one), is protected by the treaty, and is independent of any legislation by Congress, and requires no proceeding in a court of the United States to give it validity."

Again in U. S. *v.* McCullagh, this Court said, referring to a grant which purported to convey a legal as contradistinguished from an equitable title:

"In this case all the questions upon which the title of the appellees depend are strictly legal questions, to be decided in a court of law in a suit at law. They are not, therefore, within the equity jurisdiction given by the acts of 1824 and 1844. There are no equitable consideration involved in the controversy; and the validity or invalidity of this claim can be tried and determined in any court having competent jurisdiction to try and decide a disputed title to land between individual claimants. There was no necessity, therefore, for any special jurisdiction to try them."

In U. S. *v.* Roselius, 18 How. 30, at p. 34, the Court said:

"If the grant was a complete title, then no act on the part of the American government was required to give it additional validity, as the treaty of 1803, by which Louisi-

ana was acquired, sanctioned perfect titles; nor was jurisdiction vested in the district courts to adjudge the validity of perfect titles."

In the same case, at page 36, the Court said:

"Now the title set up by the petitioner is a complete legal title; and if he can establish the facts stated in his petition, his title is protected by the treaty itself, and does not need the aid of an act of Congress to perfect or complete it. * * * We shall dismiss it (the petition) without prejudice to the legal rights of either party; leaving the petitioner at liberty to assert his rights in any court having competent jurisdiction to decide upon the validity or invalidity of the complete and perfect title set up in his petition."

In Fremont *v.* U. S., the Court said, referring to the Louisiana treaty and the legislation of 1824 and 1844:

"If the party claims to have obtained from either of the former governments a full and complete title, he was left to assert it (under the Louisiana treaty) in the ordinary forms of law upon the documents under which he claimed."

And in Maguire *v.* Tyler the language is:

"Complete titles to land in the territory ceded by France to the United States under the treaty concluded at Paris on the 30th of April, 1803, needed no legislative confirmation, as they were fully protected by the third article of the treaty of cession."

So again, in U. S. *v.* D'Auterieve et al., 15 How. 14, at page 24:

"The title is a complete and perfect one. The place to litigate it is in the local jurisdiction of the state by the common law action or ejectment or such other action as may be provided for the trial of the legal titles to real estate."

In Trenier *v.* Stewart, 101 U. S. 797, the language of this Court is:

"Complete titles in Louisiana, of which there were a few, mostly derived from the dominion of the French, needed no confirmation, as they were fully protected by the treaty."

Quoting from Dent *v.* Emmeger, 14 Wall. 308:

"Titles which were perfect before the cession of the territory of Louisiana to the United States continued so afterwards, and were in no wise affected by the change in sovereignty. The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provisions upon the subject. According to that code a change of government was never permitted to affect preëxisting rights of private property. Perfect titles are as valid under the new government as they were under its predecessor."

In Strother *v.* Lucas. 12 Pet. 410, at page 438, this Court said, citing the cases:

"Without it (the provision of the treaty) the title of individuals would remain as valid under the new government as they were under the old; and those titles, at least so far as they were consummate, might be asserted in the courts of the United States independently of this article."

In the Arredondo case, 6 Pet. 689, 741, the doctrine was announced as clearly:

"The proprietors (of perfect grants) could bring suit to recover them without any action of Congress, and any question arising would be purely a judicial one."

The Louisiana court in Murdock *v.* Gurley 5 R 457, and Riddle *v.* Ratcliff, 8 A 106, said:

"A grant, complete under the French or Spanish government, required no confirmation to give it validity under ours. The former government had no legal power or discretion over it, and none passed to the United States under the treaty. It was and has remained private property, which no legislation of Congress could affect."

The same court said in Prevost *v.* Greenaux, 19 H, 1:

"A treaty of the United States with a foreign power cannot divest any rights of property vested before its ratification."

In another case before the same court, Jewell *v.* Porche, 2 A 148, the court said:

"A United States patent for land patented by Spain before the change of government is as to those claiming under the Spanish title an absolute nullity." "The title of the defendant (who claimed under the Spanish title," the court goes on to say, "was placed by the treaty of cession beyond the reach of the constitutional powers of Congress, and the patent issued by the United States in favor of the plaintiffs is, so far as the rights of defendant are involved, an absolute nullity."

The same doctrine is announced by the Supreme Court of Texas in Hancock *v.* McKinney, 7 Tex. 384, and the very many cases following it. This Hancock *v.* McKinney case was cited and approved by this Court in Gonzales *v.* Ross, 120 U. S., 605, at page 626. This Texas case is submitted as directly in point.

It is not necessary to cite further authorities. The above establish beyond room for doubt that under the Louisiana treaty and the legislation following it, the owner of a complete title could, without any proceedings in the nature of confirmation, litigate it in the courts like any other land owner.

Inasmuch as the language of the Gadsden purchase and the Louisiana treaty are, as above shown, the same, it follows by direct inference from the above authorities that the plaintiff in this case can litigate his title in the courts provided two things are true, first, that it is a complete and perfect title, and, second, that the legislation enacted to carry out the Gadsden treaty is the same in legal effect as the legislation after the Louisiana treaty.

If a perfect title under the Gadsden treaty can be shown to be in the same condition as a perfect title under the Louisiana treaty, then, of course, the above authorities are controlling precedents.

As to the first of these requirements, the fact that plaintiff alleges in his complaint that he owns the grant in fee is a sufficient allegation, so far as the question of jurisdiction is concerned, that the grant is a complete or perfect one, but it also appears from the grant itself as set out in the record that it is a complete title. This Court held in the latest case on the subject, U. S. *v.* Chaves, decided November 11, 1895, reviewing the earlier cases, that where countries have been acquired by the United States its courts take judicial notice of the laws which prevailed up to the time of such acquisition. They are not, as to such countries, foreign laws but laws of an antecedent government. This Court held, also, in U. S. *v.* Turner, *supra*, that whether an instrument constitutes a complete and perfect title by the laws of Spain is a question for the court. It is a matter of history, of which this Court can take judicial notice, that the grants made in the old intendencia of the Spanish government embracing the provinces of Sonora and Sinaloa were grants by metes and bounds for a moneyed consideration, and were perfect executed contracts of sale. The cases cited under point II. of this brief show what a perfect grant title was, and this grant so clearly fulfils every requirement that no extended argument is necessary on this point. It cannot be contended that the grant does not convey a complete title.

The language presents every link in the chain of a perfect testimonio. The terms of the granting part are conclusive, for they recite that "the original shall be delivered to the claimant for his protection and use as proprietor, owner in fee and only possessor of said land." In More *v.* Steinbach, 127 U. S., *supra*, this Court said

that the judicial delivery of possession vested an indefeasible title in the grantee, and the title-paper shows that this delivery of juridical possession was given in this grant. A grant similar in every essential respect to the one under consideration, situated in the same county of Arizona, made at nearly the same time and under the same laws, is the San Rafael de la Zanja grant, passed on by this Court in the case of Cameron *v.* The United States, *supra*. The Court expressly stated in that case that juridical possession of the land had been delivered in pursuance of the measurements. So it was in this grant, and this delivery of possession made the grant complete and perfect.

As to the second of the requirements above indicated, the question is, Is the legislation under the Gadsden treaty the same in legal effect as under the Louisiana treaty, so that the above decisions are applicable to this case?

As above stated, under the treaty of Paris no legislation was enacted regarding perfect titles. The District Courts of the United States were given jurisdiction over inchoate or equitable titles and over such titles only.

A different theory was adopted in carrying out the provisions of the treaty of Guadalupe Hidalgo. The act of March 3, 1851, by its eighth section required all titles, legal and complete as well as inchoate or equitable, to be submitted to the commissioners. Any claim not presented in the time fixed by the act was barred, as held in Botiller *v.* Dominguez, 130 U. S. 238.

But although all titles had to be submitted to that commission, so that the questions between a claimant and the United States could be determined by that tribunal, it was held in a series of cases that the grantee of even an imperfect grant might maintain ejectment upon it while it was *sub judice* under the act. A full history of such litigation is given in Montgomery *v.* Bevans, 1 Saw. 653. In Ferris *v* Coover, 10 Cal. 589, at page 621, the court held that "the action of ejectment will lie directly upon

the grant to recover the land or any portion thereof embraced within its boundaries." This case was followed in Cornwall *v.* Culver, 16 Cal. 424, and in Thornton *v.* Mahoney, 24 Cal., 569, which cases are quoted and approved in Van Reynegan *v.* Bolton, 95 U. S. 33. In carrying out the Gadsden treaty, the act of July 22, 1854, extended to Arizona by the act of July 15, 1870 (16 Stat. at Large, 291), was passed, establishing the office of Surveyor General, and providing for a preliminary report by him on claims under the former government and for final action on such claims by Congress. but before this suit was brought, these acts were repealed by the act of March 3, 1891, creating the Court of Private Land Claims.

The legislation as to private land claims in force at the time this action was brought and decided was and now is the act of March 3, 1891. Our contention is that as to perfect titles this act is similar to the acts of 1824 and 1844, because under the eighth section of the act no jurisdiction as to perfect titles was conferred upon the court created by the act. The act provides that persons claiming lands under a title "that was complete and perfect at the date when the United States acquired sovereignty therein shall have the right (but shall not be bound) to apply to the said court," etc. Thus, if the claimant did not apply, and if he was not brought in by the government, neither of which was done in this case, the act of March 3, 1891, had no more effect on him than if it had not been passed. Under the act of March 3, 1851, he was compelled to present his claim, or be bound by its limitations, but under the act of 1891 he was under no such obligation. He might present his title if he chose, or decline to do so if he saw fit, and he incurred no penalty by so declining. The stipulation herein shows that "at the time of the institution of this suit no proceedings for the confirmation of said grant were pending before

any Surveyor General of the United States, or before Congress, or before the Court of Private land Claims created under the act of Congress of March 3, 1891." As just argued, as this act of 1891 did not compel plaintiff to submit his perfect title, and as he has not chosen to do so, he is in no wise affected by that act. Not having submitted himself to it, he is no more bound by any of its provisions than if the act had provided in terms, as did the acts of 1824 and 1844, that it should not affect perfect titles. This is the unquestionable legal effect of the act. It says, in legal effect, that it shall in no wise affect any perfect title unless such title shall be brought before the Court of Private Land Claims in one of the two ways provided in the acts. As this title was not before that court, the owner of the title stands just as though the act of July 22, 1854, had been repealed and the act of 1891 had never been passed; that is to say, he stands just as the holder of a complete title did under the Louisiana treaty, with the right to litigate his title in the courts of competent jurisdiction. It seems to follow necessarily that the lower court had jurisdiction.

3. That Congress has never attempted to violate the obligations of the Gadsden treaty appears from the foregoing. The lower court says that the above-cited decisions of this Court "seem to be under different treaties, and where Congress had given the courts certain jurisdiction." The inaccuracy of this statement appears from the fact that the provision of the Gadsden treaty is identical with the third article of the treaty of Paris. The treaties are, therefore, not different but the same. Nor is it true that the decisions were where "Congress had given the courts certain jurisdiction," because no jurisdiction had been given the courts of the United States under the acts of 1824 and 1844. In the absence of any legislation whatever as to perfect titles the holdings were announced that a party claiming a full and perfect title was "left to assert it in the ordinary forms of law upon the documents

under which he claimed." This he could do "in any court having competent jurisdiction to try and decide a disputed title to land between individual claimants."

There are, it is submitted, only two reasons why a court of ordinary jurisdiction could not take cognizance of a claim under a Spanish or Mexican grant. In the first place, it could not in any case entertain a suit against the United States where the sovereign had not consented to be sued, and, in the second place, it could not entertain any case jurisdiction of which had been committed to another tribunal.

This action is not embraced within either of the foregoing reasons. It is not a suit against the United States. The government is not a party to the action, nor are its rights involved or affected in the slightest degree. Nor has jurisdiction of this cause been committed to any other tribunal. This is shown by the fact that the act of July 22, 1854, had been repealed before the filing of this complaint and the act of March 3, 1891, did not make it obligatory, as above stated, for plaintiff to come in under its provisions.

The Arizona court says that "this last act does not authorize us to settle the title to Mexican land grants." If by this is meant to settle the title as against the United States, the answer is that no such question is involved in the case. If it is meant that the court has no jurisdiction in this case unless such jurisdiction has been conferred, it is submitted that the cases heretofore cited show that this is a misapprehension. The court does not have to have jurisdiction conferred to try this perfect title; it has jurisdiction, which it retains unless some act of Congress has taken such jurisdiction away.

The lower court states that the case of Astiazaran *et al. v.* Santa Rita Mining Co., 148 U. S. 80, "settles the question that no such action as the present could be maintained if the claim had been reported to Congress by the Surveyor General, if commenced before Congress had

acted thereon." The undersigned had the honor of representing the appellants in that case, and as he understands the decision it holds just the reverse of the above proposition. This Court in that case pointed out that the mode of fulfilling treaty obligations belonged to the political department of the government; it held that the question in the case was within the jurisdiction of the Surveyor General, and concluded the decision by saying that "the petition to the Surveyor General is the commencement of proceedings which necessarily involve the validity of the grant from the Mexican government under which the petitioners claim title; the proceedings are pending until Congress has acted; and while they are pending the question of title of the petitioners cannot be contested in the ordinary courts of justice."

The petitioners were the ones in whose favor the Surveyor General had made the recommendation, and it was held that their title could not be contested by others. To construe this decision as holding that the petitioners themselves could not assert their rights would be to make the decision meaningless. The decision holds that "the question of the title of the petitioners" could not be contested, assuming, of course, that the petitioners had a title which they could litigate like any other owner of land. It will be noted that it is stipulated that the plaintiff in this action is the "vendee and assignee of and has acquired all the right, title and interest of the original grantee" of the grant, and he is, therefore, in as good a position as were the petitioners in the Astiazaran case.

Not only is it true that the act of July 22, 1854, which was the one construed in the Astiazaran case, had been repealed prior to the commencement of this action, and no jurisdiction of the cause had been committed to any other tribunal, but, in addition, it seems clear that the question involved in this case could not be determined by any tribunal but a judicial one. The question in the Asti-

azaran case was considered to be within the province of Congress to determine because "it necessarily involved the validity of the grant from the Mexican government," which question was then pending before Congress. The contention in that case was, in effect, between A and B, rival claimants to the grant, and this Court held that it could not decide that B, who was opposing the claim of the petitioners, was the owner, because Congress might decide that the petitioners were the owners, in which case its decision would control. But in the present case, as more than once stated, there is no question which has or could come before Congress, at least, under any legislation now in force, or in force when the suit was brought.

As opposed to the theory of the lower court that it could not try this case unless jurisdiction were expressly conferred, this Court held in U. S. *v.* McCullagh, as heretofore quoted, that "there was necessity for any special jurisdiction to try perfect titles. Questions growing out of them "are purely judicial ones." U. S. *v.* Arredondo, *supra*. These Louisiana and Florida state courts of local jurisdiction had no special jurisdiction conferred upon them, and possessed no ampler jurisdiction than the district courts of Arizona. This Court having so often held that persons claiming to own perfect titles could protect their property in these Louisiana local courts, it is submitted that such jurisdiction can be denied to the Arizona courts only by abandoning the doctrine of the early cases. The decision of the Arizona court cannot be reconciled with the decisions of this Court.

The lower court puts the question "Suppose we should consider plaintiff's title complete and perfect and order the title quieted, and afterwards action should be begun in the land court against the owner of the grant under section 8 of the act of March 3, 1891, and that court should hold the grant of no avail, of what force

would our decree be?" The question presents no difficulty. If A's title is quieted in a suit against B, and afterwards C's title is quieted in a suit against A, no confusion results. The decree in favor of A is not set aside because of the later decree in favor of C.

Referring again to the California and other cases cited above as to the rights of the grantee by virtue of the grant itself, it is held in Montgomery *v.* Bevans, 1 Saw. 658, at at pages 682 *et seq.*, that grant claimants have a right to the possession of lands claimed under their grants until final segregation or final action by the government on the claim. This and the other cases are put on the ground that all grants, whether perfect or imperfect, "passed to the grantees a present and immediate interest in the premises designated." "The grantees were obliged to take possession, and their right of possession necessarily extended to the whole tract." So, in Ferris *v.* Coover, 10 Cal., 589, *supra*, at page 621, a case in which the court said that the questions had attracted the attention of the ablest jurists in that state, and had been placed before the court in every possible view, the court held that the possession of a grantee under a Mexican grant "was his right. It was a right to the use and enjoyment of property, and as such was guaranteed by the stipulation of the treaty. It accompanied the grant, and, like any other right of property, may be enforced in our courts. The grant conveying, as we have seen, the title, carries with it the right to the possession, use and enjoyment of the land until by the appropriate action of the general government the estate of the grantee is defeated--admitting that it is competent for the government to provide for defeating it. It follows that the action of ejectment will lie directly upon the grant to recover the land, or any portion thereof, embraced within its boundaries."

This case was cited, approved and followed in Cornwall *v.* Culver, 16 Cal. 424, where the court said that "it

is a matter of surprise that there was ever any serious question as to the right of Sutter (a Mexican grant claimant), or those claiming under him, to recover possession by virtue of the grant itself." So, in Thornton *v.* Mahoney, 24 Cal. 569, the same doctrine of the right of the grantee to possession under his grant is declared to be "in consonance with the principles of reason and justice," and to meet with the approval of the court.

These cases are quoted and approved in the decision of this Court in Van Reynegan *v.* Bolton, 95 U. S. 33, where Mr. Justice Field in delivering the opinion of the Court reaffirms the doctrine that until final action or segregation by the government, no survey "could impair the right of the grantees to the possession of the entire tract as delivered by the former government to the grantee under whom they claim. Until then no person could interfere with their right of possession of the whole." The possession of defendants, who had intruded upon the lands claimed was, therefore, "that of simple intruders and trespassers without color of right."

These cases seem to be directly in point, and if the principles which they announce are to control, it seems that the conclusion of the lower court cannot stand. In U. S. *v.* Chaves, *supra*, this Court in construing the treaty of Guadalupe Hidalgo, adopted the language of Chief Justice Marshall in U. S. *v.* Percheman, 7 Pet. 51, 86: "The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

This general principle is specifically embodied in article 8 of the treaty of Guadalupe Hidalgo and article 5 of the Gadsden treaty, by which articles the property of Mexicans within the territory ceded by Mexico to the

United States was to be "inviolably respected," and they and their heirs and grantees were "to enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States." Astiazaran *v.* Santa Rita Land & Mining Co., 143 U. S., *supra*, 80, 81.

This treaty provision plaintiff invokes in this case. The grantee of this Sonoita grant was, "as proprietor, owner in fee and only possessor of the said lands," given the use and property thereof by the former government. One of his rights incident to his ownership was to go into the courts to assert or defend his property by proper judicial proceedings. "Individual rights of property in the territory acquired by the United States from Mexico were not affected by the change of sovereignty and jurisdiction," as this Court held Botiller *v.* Dominquez, *supra*, (130 U. S. 249). Therefore, we submit, the individual right of the owner of this grant to bring this suit was not affected by the change of sovereignty, and the court had jurisdiction to hear this action. If this right be denied, it can only be by treating as a nullity, for the purpose of this action, a complete and perfect title derived from the former government, when a similar title from our own government would be respected. The holder under a patent from the United States could maintain a suit to quiet his title, but this holder under a patent from Mexico is by the Arizona court denied the right.

In the very recent case of Shiver *v.* U. S., decided November 11, 1895, this Court points out that under the homestead laws "the right which is given to a person or corporation by a reservation of public lands in his favor, is intended to protect him against the action of third parties, as to whom his right to the same may be absolute. But, as to the government, his right is only conditional and inchoate. As between the United States and the settler the land is for certain purposes to be deemed the property

of the former, whereas between the settler and the State it may be deemed the property of the settler."

This principle applies, to some extent, to the present case. The plaintiff's rights, claiming under a complete and perfect title, are absolute as against the defendant herein, although plaintiff may be called on at any time to prove his claim against the United States in any tribunal in which Congress may establish for that purpose. A claim under a grant exactly similar to the one in this case was held by this Court in Cameron *v.* U. S., 148 U. S. 301, *supra*, to constitute claim or color of title. In Newhall *v.* Sanger, 92 U. S. 761, this Court announced that the duty of adequately ascertaining and protecting all claims to land under the former government, a duty enjoined by a sense of natural justice and treaty obligations, could only be discharged by prohibiting intrusion upon the claimed lands until a determination of the claim. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication, and the claimed lands were regarded as forming "a part of our national domain only after the claim covering them had finally been decided to be invalid."

The lower court holds that "Congress must in some way confirm this class of Mexican grants before we have jurisdiction thereof." Under such a view, the rights to judicial protection which existed prior to the treaty disappear. A generation has passed away since the Gadsden treaty, and many years more must elapse before the questions between the grantees of these grants and the United States can be finally determined. During this interval is the grantee of a grant to be deprived of judicial redress against trespassers on what he claims to be his property? If so, the effect will be nothing less than the destruction of his rights. The court did not think in Ferris *v.* Coover that he was to be left thus helpless, and we believe this Court will not think so, but will hold that until this grant is

defeated, if it ever should be, by the appropriate action of the general government, the grantee is entitled to the possession, use and enjoyment of the land, and to invoke the protection of the courts in the present action.

It is respectfully submitted that the court had jurisdiction of this action, and that the judgment of the Supreme Court of Arizona should be reversed.

Rochester Ford.

ROCHESTER FORD,

Attorney for Appellant.

In the Supreme Court of the United States.

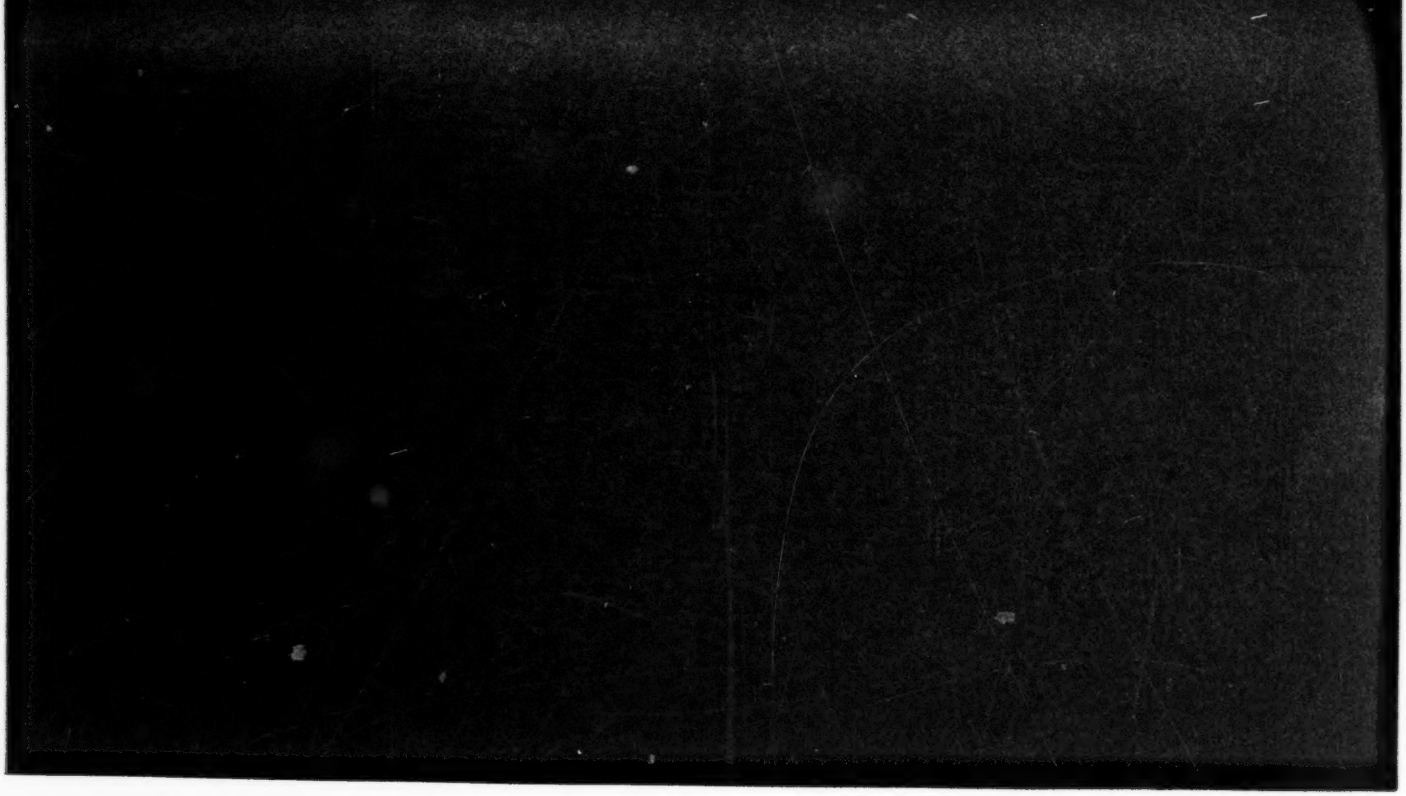
OCTOBER TERM, 1897.

SANTIAGO ARIZA, ADMINISTRATOR, with will annexed, of FRANK ELY, deceased, appellant;

THE NEW MEXICO AND ARIZONA Railroad Company.

No. 15.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.



In the Supreme Court of the United States.

OCTOBER TERM, 1897.

SANTIAGO ARMIJO, ADMINISTRATOR, with will annexed, of Frank Ely, deceased, appellant, v. THE NEW MEXICO AND ARIZONA Railroad Company.	No. 15.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF ON BEHALF OF THE UNITED STATES.

The intervention on behalf of the Government in this case was made necessary by reason of the pendency in this court, on appeal from the Court of Private Land Claims, of the case of *Armijo, etc., et al.* v. *United States*, No. 27, a suit instituted on behalf of the Government, under the provisions of the third paragraph of section 8 of the act of 1891 creating the Court of Private Land Claims, to test the validity of a private land claim known as the San José de Sonoita grant, situate in the

Territory of Arizona and within the demarcations of the territory acquired from Mexico under the Gadsden purchase.

The suit on behalf of the United States was directed by the Attorney-General by reason of the pendency in the district court of Arizona of this suit of *Ainsa, etc.*, v. *The New Mexico and Arizona Railroad Company*, and now in this court on appeal as No. 15, and that of the same plaintiff against the same defendant and others, No. 16, by which it was sought to quiet the title of the plaintiff under the statutes of Arizona against the defendants who were in possession of certain portions of the Sonoita grant. Upon the institution of the proceedings in the Court of Private Land Claims, it was supposed and understood by counsel for the Government that no further steps would be taken in the Territorial court until the final determination of the validity of the Sonoita grant by the Court of Private Land Claims and this court in case of appeal.

The attention of counsel was called to the fact that this case was pending on appeal from the Territorial supreme court and had been submitted under the twentieth rule, and motion was made to remand the same to the docket and permit the United States to intervene.

From the record it appears that the plaintiff filed his suit in the district court of the first judicial district of the Territory of Arizona on June 1, 1892, alleging that he was the owner in fee of all that certain tract of land granted by the Mexican authorities to Leon Herreras on May 15, 1825, and that the same was known as and called

the Rancho de San José de Sonoita, specifying its location, and which was more particularly described by extracts from the *testimonio* of the alleged grant; that the defendant claimed an estate or interest in the same adverse to the plaintiff, and that said claim was without any right whatsoever, as the defendant had no estate, right, title, or interest in said lands or any part thereof; praying judgment—

> (1) That said defendant be required to set forth the nature of its claims, and that all adverse claims of the defendant may be determined by a decree of this court.
>
> (2) That by said decree it be declared and adjudged that the defendant has no estate or interest whatever in or to said lands and premises, or in or to any part thereof, and that the title of plaintiff is good and valid.
>
> (3) That the defendant be forever enjoined and debarred from asserting any claim whatever in or to said land or premises, or to any part thereof, adverse to the plaintiff, and for such and further relief as to this honorable court shall seem meet and agreeable to equity and for his costs of suit. (R., 1–3.)

About nine months after the institution of the suit by the United States, before referred to, an answer was filed by the defendant railroad company. Prior to this, however, on May 29, 1893, an agreed statement of facts was entered into by the attorneys for the respective parties, and on June 5, 1893, the same was filed, by which it was provided that a jury be waived and judgment might be rendered upon the same as and for the evidence in the case. (R., 6–13.)

This statement of facts consisted simply in an admission on behalf of the railroad company that the grant of one and three-fourths *sitios* made to Herreras of the place called San José de Sonoita was made, executed, and delivered to him at the time and place and by the persons and officials when, where, and by whom it purports to have been signed, made, executed, and delivered, and that the plaintiff was the vendee and assignee of and acquired all the right, title, and interest of the original grantee thereof, and a translation of the *titulo* of the Sonoita grant was fully set forth therein; that the claimant had filed, on December 29, 1879, before the surveyor-general of Arizona, under the laws of July 22, 1854, and July 15, 1870, a petition for the confirmation of the same by Congress, and that the same was never acted on by Congress, and at the time of the institution of the suit no proceedings for the confirmation of the same were pending before the Surveyor-General of the United States, or before Congress, or before the Court of Private Land Claims, created under the provisions of the act of Congress of March 3, 1891. It was further stipulated that, prior to the commencement of the action, certain persons named had entered upon the land within the limitations of the grant as preemption or homestead settlers, claiming the same to be public lands of the United States, and that thereafter, and before the commencement of the suit, the defendant, by condemnation proceedings against and sundry mesne conveyances from the said named persons, acquired and claimed a right of way through said several tracts of land so settled upon, which right of way

was within the limits of the grant; that the agreed statement of facts was for the purpose of this suit only, and nothing therein agreed upon should be taken as admitted for or against either of the parties thereto in any other proceeding whatever. (R., 6–13.)

Upon this state of the record the district judge held that plaintiff's title was not a Spanish or Mexican grant which had been confirmed by Congress, and that the court had no jurisdiction. (R., 14–15.)

An appeal was taken to the supreme court of the Territory and the judgment was affirmed. (R., 19.)

From this decision an appeal was taken to this court, and, as before stated, the case was submitted under the twentieth rule.

It is contended by the appellant that, at the date of the cession to the United States, Herreras and those claiming under him had a complete and perfect title to the grant in question and could assert the same in any form of action against parties other than the United States in any court having jurisdiction of controversies between private parties; that although the act creating the Court of Private Land Claims conferred exclusive jurisdiction upon it to settle and adjudicate such claims as between the United States and claimants of private land claims protected under the treaties of Guadalupe Hidalgo and Mesilla (Gadsden purchase), yet, as this title is alleged to be a complete and perfect grant acquired from Mexico, plaintiffs were given the permission to invoke the jurisdiction of that court, but were not compelled to do so (section 8, act of March 3, 1891, creating Court of Private Land

Claims). Hence it became the duty of the district court to proceed under the statutes of Arizona to try the title at the suit of the claimant to the grant, which it did upon the agreed statement of facts, and upon the whole record dismissed the petition for want of jurisdiction. The form of action, if the court entertained jurisdiction thereof, necessarily required it to determine, as a matter of law, whether the grant alleged to have been made to Herreras by the Republic of Mexico was a complete and perfect title at the date of the cession of the Territory to the United States.

The acts of Congress of 1805, 1807, 1824, and 1844 were passed for the purpose of settling and adjudicating private land claims in the Louisiana purchase where the titles claimed were equitable. The act of 1851 (California act) conferred upon a board of commissioners and upon the district court on appeals jurisdiction of both perfect and imperfect grants, and it was held in the case of *Botiller* v. *Dominguez* (130 U. S., 238), that one claiming under a perfect grant, which had not been confirmed under that act, could not assert the same against private individuals in the local courts. The language of the California act differs materially from that contained in the Missouri acts.

It is contended on behalf of the appellant that the act creating the Court of Private Land Claims (section 8) differs from the California act in that the jurisdiction over perfect claims is permissive but not compulsory, and, as no penalty for failure to present the same was prescribed, the right to proceed in the local courts upon a perfect title was in no way impaired.

Considering the entire act creating the Court of Private Land Claims, and especially all the provisions of section 8, appellant's view seems to be extreme on the state of the case. That section provides, the claimant, if he has a complete and perfect title to his grant, may institute his suit in the Court of Private Land Claims seeking confirmation of the same, but shall not be bound to do so; it also provides that the United States may proceed against him in that court to test the validity of his grant or determine the extent of its boundaries, and such a proceeding had been instituted with respect to the grant in this case long prior to the filing of the answer by the defendant. Construing both clauses, it would seem that an adjudication of all claims to land was contemplated, either by the claimants or by the United States, whether they were perfect or imperfect, and that claimants were given until March 3, 1893, to determine whether they would elect to stand on their titles as perfect, and not seek the jurisdiction of that court, and assume the peril of having their claims barred if, upon a proceeding thereafter by the United States, the courts should hold the same to be only equitable. This position is justified by the provisions of the treaty itself which, it is contended, was purely and simply executory in its terms.

"Although a foreign treaty is, by the Constitution of the United States, in like manner with acts of Congress and the Constitution the supreme law of the land, yet generally it does not execute itself, but requires some legislation, especially under a republican form of government, to carry it into effect. Chief Justice Marshall

clearly explains the rule as to the relation between treaty and statutory law, when he says that a treaty 'is to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court.'" (II Wharton's International Law Digest, p. 71.)

The treaty of 1853 contains a provision not contained in that of Guadalupe Hidalgo of 1848, which, it is contended, makes it necessary for claimants to obtain recognition of their rights, although they may deem their titles complete and perfect.

> ART. VI. No grants of land within the territory ceded by the first article of this treaty bearing date subsequent to the day—twenty-fifth of September—when the minister and subscriber to this treaty on the part of the United States proposed to the Government of New Mexico to terminate the question of boundary, will be considered valid or be recognized by the United States, or will any grants made previously be respected or be considered as obligatory which have not been located and duly recorded in the archives of Mexico.

It will thus appear that, no matter what estate was vested in the grantee, no grant of land was to be *respected* or considered *obligatory* upon the United States unless two conditions appear to have been complied with:

(1) The definite location of the grant on the earth's surface.

(2) That the grant had been duly recorded in the archives of Mexico.

It is reasonable to assume such a qualification of the usual provisions contained in treaties of cession was intended to restrict claimants in the assertion of their titles, although the estate might be a perfect one. Before the local court could quiet the title of plaintiff it must have found that the same was complete and perfect at the date of the cession and should be respected and considered obligatory by the United States, which obligation can alone be determined under the authority of the political branch of the Government. Although the United States was not a party to the suit, still for plaintiff to recover the court must necessarily determine those two questions which were intended to be determined under the authority of Congress.

Assuming that the plaintiff could proceed upon his allegation of the ultimate fact of the vesture of a complete and perfect title and that upon such allegation it became the duty of the court to hear and try that question for him, it does not follow that his allegation has been sustained by the evidence (agreed statement of facts). The court below did entertain jurisdiction, considered his evidence, and dismissed his complaint, because, upon the whole record, want of jurisdiction appeared by reason of the fact his title was under a certain Spanish or Mexican grant which had not been confirmed by Congress. The conclusion of the court may well be justified under the terms of the treaty of 1853 and under the provisions of the act of 1891 conferring jurisdiction upon

the Court of Private Land Claims, for, in respect of all claims, whether perfect or imperfect, Congress declared by that act exactly how far and upon what conditions the United States would be bound.

It is not to be supposed that citizens of the United States, when called upon to contest in the local courts claims made under Spanish and Mexican land grants, would be placed in any different attitude than the Government permitted itself to assume in carrying out treaty obligations.

Section 13 of that act provides:

> That all the foregoing proceedings and rights shall be conducted and decided subject to the following provisions as well as to the other provisions of this act.

This applies to all grants, perfect and imperfect.

The eighth subdivision of this section provides:

> No concession, grant, or other authority to acquire land made upon any condition or requirement, either antecedent or subsequent, shall be admitted or confirmed unless it shall appear that every such condition and requirement was performed within the time and manner stated in any such concession, grant, or other authority to acquire land.

If any grant was made on a condition or requirement subsequent, the compliance with which was not made to appear to the satisfaction of the court, it could not be admitted or confirmed; yet it has been held that a complete and perfect title often passed with conditions subsequent imposed, and, in the absence of some proceeding to divest said perfect title for failure to comply therewith, the

estate remained vested and could not be collaterally attacked. Unless, therefore, all claims to land were intended to be embraced within the scope of this act, claimants of perfect titles, with unperformed conditions subsequent, could obtain full recognition of all their rights as against citizens in the local courts, and yet would fail when the United States is called upon to recognize the same.

It is not believed that the local court in this proceeding could investigate this question unless it assumed jurisdiction alone conferred upon the Court of Private Land Claims.

The courts of the country can go no farther in carrying out treaty obligations than the political branch of the Government has authorized, nor is it possible to assume that they will take a different view of these obligations from that taken by that branch of the Government; hence the act creating the Court of Private Land Claims is the declared intent of that branch of the Government, and the district court must, in considering whether a grant was complete and perfect under the laws of Spain or Mexico, look to said act to determine whether this Government has authorized its recognition and upon what terms and conditions. The instant it does so, its jurisdiction ceases.

The observations by Mr. Justice Gray in the case of *Astiazaran* v. *Santa Rita, etc., Co.*, 148 U. S., 80–83, seem very pertinent to this question:

> The action of Congress, when taken, being conclusive upon the merits of a claim, it necessarily

> follows that the judiciary can not act upon the matter while it is pending before Congress; for if Congress should decide the same way as the court, the judgment of the court would be nugatory; and if Congress should decide the other way, its decision would control.

Also the observation of Judge Hawkins in the opinion of the court below (R., 21):

> Appellant wants us to consider his grant as being under the provisions of section 8, or, rather, of the first paragraph of section 8 of the last-mentioned act (March 3, 1891)—that is, one that was complete and perfect when the United States acquired sovereignty—and not under section 6 of said act. Suppose we should do so and order the title quieted, and some of the settlers thereon should get the Attorney-General to commence an action in the land court against the owner of the grant under said section 8, and that court should hold said grant of no avail, then of what force would our decree be?
>
> Congress in providing a remedy for settling these disputed titles has nowhere delegated any authority to these courts to settle same. It has reserved to itself the power of settling such titles and has delegated its power to the land court.

Judge Hawkins, at the time the opinion was written, was aware, no doubt, of the pendency and pending trial of the suit on behalf of the United States against Ainsa, administrator, etc., to test the very question he was seeking to get that court to determine in his favor in an effort to quiet title against the railroad company.

It is believed that the declared intent of Congress expressed in the act of March 3, 1891, necessarily

deprived the local courts of the right to exercise any jurisdiction, because they were incompetent to determine in any proceeding between private parties the very facts it required should be made to appear by claimants as a condition precedent to the right to have their claims admitted or confirmed, whether perfect or imperfect.

It is therefore submitted that the local courts of the Territory of Arizona had no jurisdiction in the matter.

Respectfully submitted.

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MATTHEW G. REYNOLDS,
Special Assistant to the Attorney-General.